November 2003

Update: Adoption Proceedings Benchbook

CHAPTER 3

Identifying the Father

3.2 Due Process and Equal Protection for Fathers

Insert the following case summary on page 82, after the second paragraph:

- ***Aichele v Hodge*, ___ Mich App ___ (2003)**

In *Aichele*, Sandra Hodge, the mother, was married when she conceived and gave birth to Katherine Hodge, a child who was not an issue of the marriage. In March 1998, two months after the child's birth, the mother and putative father, George A. Aichele, underwent paternity testing. The results showed that there was a 99.99 percent chance that Aichele was the child's biological father. The mother and Aichele then signed an affidavit of parentage and named Aichele as the child's father on her birth certificate. Four years later, the mother told Aichele that he could no longer have contact with Katherine. Aichele then filed a petition for custody, parenting time, and child support alleging that he and Sandra Hodge were Katherine's "parents." The mother filed a motion to dismiss for lack of standing asserting that Katherine is presumed to be an issue of the marriage because she was conceived and born in wedlock. Sandra Hodge's husband, Carey Hodge, filed a successful motion to intervene and alleged that he was Katherine's presumptive father. Carey Hodge indicated that he was unaware of the affidavit of parentage and the affidavit was invalid because the Acknowledgment of Parentage Act requires the child's mother to be unmarried. Aichele filed a motion for summary disposition indicating that he visited with the child and provided support for the child. The trial court denied Aichele's motion for summary disposition and found that the steps taken by Aichele to sign the acknowledgment and amend the birth certificate did not "in any way negate the parentage of [Carey] Hodge." ___ Mich App at ___. The trial court also ruled that the statutes Aichele relied upon in his motion for summary disposition were only applicable to children born out of wedlock. ___ Mich App at ___.

Aichele appealed the decision, arguing that he had a protected liberty interest in his established relationship with Katherine. Aichele relied on *Hauser v*

Reilly, 212 Mich App 184 (1995). The *Hauser* court found that a putative father who has an established relationship with his child has a protected liberty interest in that relationship under the *Michigan* Constitution, *Id*. at 188, relying upon *Michael H v Gerald D,* 491 US 110, 142–43 (Brennan J, dissenting) (1989). In *Aichele*, the Court of Appeals concluded that not only did the evidence of record not show a relationship between Aichele and the child, but that the statements in *Hauser* were dicta. *Aichele, supra* at ___, citing *McHone v Sosnowski*, 239 Mich App 674 (2000). The Court stated that "[t]here has yet to be any determination in this state that a putative father of a child born in wedlock without a court determination of paternity has a protected liberty interest with respect to a child he claims as his own."

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3.7 Acknowledgment of Parentage

B. Effect of Acknowledgment

Insert the following text on page 95, immediately before Section 3.7(C):

In *Aichele v Hodge*, ___ Mich App ___ (2003), the Michigan Court of Appeals determined that an acknowledgment of parentage is not valid when the child is not "born out of wedlock," even where the mother voluntarily signs an acknowledgment indicating that her husband is not the biological father. In *Aichele*, Sandra Hodge was married when she conceived and gave birth to Katherine Hodge, a child who was not an issue of the marriage. In March 1998, two months after the child's birth, the mother and putative father, George A. Aichele, underwent paternity testing. The results showed that there was a 99.99 percent chance that Aichele was the child's biological father. The mother and Aichele then signed an affidavit of parentage and named Aichele as the child's father on her birth certificate. Four years later, the mother told Aichele that he could no longer have contact with Katherine. Aichele then filed a petition for custody, parenting time, and child support alleging that he and Sandra Hodge were Katherine's "parents." The mother filed a motion to dismiss for lack of standing asserting that Katherine is presumed to be an issue of the marriage because she was conceived and born in wedlock. Sandra Hodge's husband, Carey Hodge, filed a successful motion to intervene and alleged that he was Katherine's presumptive father. Carey Hodge indicated that he was unaware of the affidavit of parentage and the affidavit was invalid because the Acknowledgment of Parentage Act requires the child's mother to be unmarried. Aichele filed a motion for summary disposition indicating that he visited with the child and provided support for the child. The trial court denied Aichele's motion for summary disposition and found that the steps taken by Aichele to sign the acknowledgment and amend the birth certificate did not "in any way negate the parentage of [Carey] Hodge." ___ Mich App at ___. The trial court also ruled that the statutes Aichele relied upon in his motion for summary disposition were only applicable to children born out of wedlock. ___ Mich App at ___.

Aichele appealed the trial court's decision and argued that the affidavit of parentage provides him with standing to seek custody and/or parenting time under the Child Custody Act. The Court of Appeals disagreed and held that in order for an affidavit of parentage to be properly executed the child must be "born out of wedlock." The Court of Appeals reviewed the definition of "child" contained in the Acknowledgment of Parentage Act and the definition of "child born out of wedlock" in the Paternity Act.* The Court found that under both the Paternity Act and the Acknowledgment of Parentage Act, paternity can only be established if the child is "born out of wedlock," i.e.,

*See Section 3.3 for a detailed comparison of the definitions of "child" and "child born out of wedlock."

either the child is born to a woman who is not married at the time of conception or birth or a court has already determined that the child was not an issue of the marriage. ___ Mich App at ___. In concluding that Aichele did not have standing, the Court stated:

> "In short, an affidavit of parentage can never be properly executed unless a child is born out of wedlock. Katherine was not born out of wedlock because she was conceived and born during [Sandra Hodge's] marriage to Hodge and there had been no judicial determination that she was not an issue of the marriage. Therefore, the affidavit of parentage signed by plaintiff and defendant was invalid. Because the affidavit of parentage was invalid, it does not provide plaintiff with standing to seek custody of Katherine." ___ Mich App at ___.

Cooper, PJ, dissenting, also compared the definitions of "child" and "child born out or wedlock" in the Paternity Act and the Acknowledgment of Parentage Act. The dissent indicated that the majority overlooked a significant difference between the two definitions:

> "Notably, the Acknowledgement [sic] of Parentage Act defines a child as an individual 'conceived and born to a woman who was not married at the time of conception or the date of birth of the child, or a child that the circuit court *determines* was born or conceived during a marriage but is not the issue of that marriage.' In this regard, I note that both *Girard*[*v Wagenmaker,* 437 Mich 231 (1991)*] and the Paternity Act existed well before the Legislature enacted the Acknowledgement [sic] of Parentage Act in 1996. So it can only be assumed that the Legislature was aware of the Supreme Court's analysis in *Girard* that the use of 'determine' in the past perfect tense would require a previous court determination that the child was not an issue of the marriage. Under the same rationale, the use of 'determine' in the present tense indicates a legislative intent to depart from the requirement of a past determination in the Acknowledgement [sic] of Parentage Act. . . . Accordingly, I conclude that the Legislature's use of the present tense in the phrase 'that the circuit court determines,' renders a prior determination of whether the child was an issue of the marriage unnecessary in the Acknowledgement [sic] of Parentage Act. This is only logical, given the fact that a putative father seeking standing under this act is armed with an acknowledgment of his paternity voluntarily signed by the mother." ___ Mich App at ___.

*See Section 3.8(B) for a case summary of *Girard v Wagenmaker*, 437 Mich 231 (1991).

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3.8 The Paternity Act

B. A Child That the "Court Has Determined to Be a Child Born or Conceived During a Marriage but Not the Issue of That Marriage"

Insert the following on the bottom of page 100, immediately after the October 2003 Update for *Kaiser v Schreiber*, ___ Mich App ___ (2003):

Note: In *Aichele v Hodge,* ___ Mich App ___ (2003), the Court of Appeals expressly criticized the Court of Appeals' holding in *Kaiser v Schreiber*, ___ Mich App ___ (2003). In *Aichele*, the Court of Appeals stated:

> "[T]o the extent *Kaiser* allows a defendant to essentially confer standing on a plaintiff by admitting his paternity, we note our strong disapproval of the majority opinion and agree with Judge Wilder's dissent. First, the holding completely disregards the presumption of legitimacy and its underlying purpose and circumvents established legal process. It permits the mother of a child born out of wedlock and the putative father to collude and essentially rob the presumed father of his parental rights and his child. This is particularly egregious as a married father would be stripped of his parental rights without notice or hearing." ___ Mich App at ___.

The Court further concluded that *Kaiser* "wrongly held that the mere lack of dispute of paternity between a plaintiff and defendant can overcome the well-established presumption of legitimacy." ___ Mich App at ___.

The dissent in *Aichele* disagreed with the majority's disapproval of the decision in *Kaiser*. The dissent noted that pursuant to MCR 7.215(I)(1), "[a] panel of this Court is required to follow a prior published opinion of this Court issued on or after November 1, 1990." ___ Mich App at ___.

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3.10 Putative Father Hearing — Child Protective Proceedings

Insert the following on the bottom of page 120, before the last paragraph:

In *In re CAW,* 469 Mich 192 (2003), the Michigan Supreme Court reversed the Court of Appeals' decision that a putative father has standing to intervene in a child protective proceeding under the Juvenile Code where the child involved has a legal father. *In re CAW* involved a married couple, Deborah Weber and Robert Rivard, and their children. In July 1998, a petition alleging abuse and neglect was filed pursuant to MCL 712A.2(b). The petition stated that Rivard was the legal father of the children but might not be the biological father of "any or all of the children." The petition also indicated that Larry Heier was the biological father of one of Weber and Rivard's children, CAW. The trial court published a notice of hearing to Heier, but he did not attend any hearings. Later Rivard and Weber indicated that Rivard was the father of all of the children. The trial court then deleted all references to Heier contained in the petition. In November 2000, Weber and Rivard's parental rights to CAW were terminated. Heier then filed a motion in the trial court seeking to intervene in the child protective proceedings. Heier alleged that he was the biological father and had standing on that basis. The lower court denied Heier's motion. 469 Mich at 197. The Court of Appeals reversed.

*MCR 5.921 was amended on May 1, 2003. See MCR 3.921(C).

The Supreme Court held that Heier did not have standing to intervene in the child protective proceedings. *Id.* The Court indicated that intervention in such a proceeding is controlled by MCR 5.921(D),* which provided, in part, that a putative father is entitled to participate only "[i]f, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 5.903(A)(4). . . ." MCR 5.903(A)(4) defined a "father" as "a man married to the mother at any time from a minor's conception to the minor's birth unless the minor is determined to be a child born out of wedlock . . . ." MCR 5.903(A)(1) defined a "child born out of wedlock" as a child conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of the marriage. Because Weber and Rivard were married during the gestation period, CAW was not "born out of wedlock." No finding had ever been made that CAW was not the issue of the marriage, and the termination of Rivard's parental rights was not a determination that CAW was not the issue of the marriage. Therefore, the requirements of MCR 5.903 were not met, and Heier did not have standing. The Court also stated the following regarding the policy underlying the applicable rules:

> "Finally, in the Court of Appeals opinion, as well as the dissent, there is much angst about the perceived unfairness of not allowing Heier the opportunity to establish paternity. We are more comfortable with the law as currently written. There is much that benefits society and, in particular, the children of our state, by a legal regime that presumes the legitimacy of children born during a marriage. See *Serafin v Serafin*, 401 Mich 629, 636; 258 NW2d 461 (1977). It is likely that these values, rather than failure to consider the plight of putative fathers who wish to invade marriages to assert paternity claims, motivated the drafters of the rules and statutes under consideration." 469 Mich at 199-200.

Justice Weaver concurred with the result of the majority's opinion but provided different reasoning. Justice Weaver indicated that the definition of "child born out of wedlock" in MCR 5.903(A)(1) varied from the definition in the Paternity Act only in the additional provision in MCR 5.903(A)(1) that paternity could be determined "by judicial notice or otherwise." However, the additional provision does not affect when the determination that the child is not an issue of the marriage must be made in order to permit standing. Pursuant to *Girard v Wagenmaker,* 473 Mich 231, 242–43 (1991), in order to establish paternity under the Paternity Act of a child born while the mother was legally married to another man, there must be a prior court determination that the mother's husband is not the father. Justice Weaver stated the following:

> "The provision [in MCR 5.903] that the determination may be made by judicial notice does not affect when the determination must be made in order to permit standing. Moreover, the use of the past tense makes even clearer the fact that the determination must be made by the court *before* a putative father may be accorded standing in a child protective proceeding. Because Weber was married to Rivard from the time of conception to the birth of CAW, and because CAW was not 'determined by judicial notice or otherwise to have been conceived or born during a marriage but . . . not the issue of that marriage' pursuant to MCR 5.903(A)(1), the provisions for notice to a putative father in MCR 5.921(D) were not applicable." (Footnotes omitted.) 469 Mich at 203.

Justice Kelly wrote separately, concurring in part and dissenting in part. Justice Kelly agreed with the result reached by the majority but disagreed with the majority's reliance on MCR 5.921(D) and the policy underlying the Paternity Act. Justice Kelly indicated that MCR 5.921 does not explicitly address standing to intervene: it designates the persons who must be given notice before a child protective proceeding can go forward. MCR 5.901, which prescribes the court rules that apply to child protective proceedings, does not include a rule that permits intervention in a child protective proceeding. Therefore, Justice Kelly would hold that Mr. Heier could not identify a court rule under which he could intervene and, as a consequence, the trial court was required to deny his motion. 469 Mich at 208.

In regards to public policy, Justice Kelly stated the following:

> "I do not agree that the presumption of legitimacy rule has persuasive force in this case. Certainly, the majority would not advance the argument that this rule protects the sanctity of CAW's family unit. That proposition is absurd in the context of termination proceedings, the object of which is to *destroy* any familial bond between a child and the parent whose rights are being terminated.
>
> "Similarly, the policy cannot be advanced on the basis that it furthers the goals expressed in the juvenile code. Rigid application of the presumption of legitimacy would frustrate the code's preference for placing a child with his parent, if the parent is willing and able to care for him." 469 Mich at 206–07.

Justice Kelly urged that the court rules be amended to allow a putative father the right to intervene in a child protective proceeding if he is able to raise a legitimate question about paternity. 469 Mich at 208.

Dissenting, Justice Cavanagh argued that the Legislature intended to allow putative fathers an opportunity to intervene in child protective proceedings. Justice Cavanagh stated:

> "[N]othing in our statutes or court rules compels the conclusion that a putative father must first establish paternity in a separate legal proceeding. To so hold perpetuates the errors caused by the majority's position in *Girard*[*v Wagenmaker,* 437 Mich 231 (1991)], while denying parents the right to develop and maintain relationships with their children." 469 Mich at 209.

The dissent also indicated that the courts making paternity and custody determinations have the authority to inquire about a child's putative father or parent in fact in order to ensure the protection of a child's best interests and due process rights. *Id.*

In *In re CAW (On Remand)*, ___ Mich App ___, ___ (2003), the Supreme Court instructed the Court of Appeals to addressed Heier's argument that "the juvenile code, by precluding standing to intervene in a child protective proceeding, deprives him of a fundamental right without the benefit of procedural or substantive due process."

The Court of Appeals stated that *Girard v Wagenmaker*, 437 Mich 231 (1991), held that "a putative father lacks standing to challenge paternity if a prior determination on paternity regarding the mother's husband was not made." However, in *Hauser v Reilly*, 212 Mich App 184, 188–89 (1995), the Court of Appeals concluded that the state constitution affords a putative father a due process interest in proceedings related to paternity if the putative father has an established relationship with the child. *Hauser, supra*, relied upon Justice Brennan's dissent in *Michael H v Gerald D,* 491 US 110, 142–43 (1989), which provided that if a father has established a "substantial" relationship with his child, then he has a protected liberty interest. In *CAW (On Remand)*, the Court of Appeals noted that in *McHone v Sosnowski*, 239 Mich App 674 (2000), it refused to apply *Hauser*, *supra*, even where evidence of a relationship between the putative father and the child existed because *Hauser's* discussion of a putative father's liberty interest was dictum. Therefore, the Court of Appeals in *CAW* held that "*McHone* precludes a finding that plaintiff has a protected liberty interest in his relationship with CAW." The Court went a step further and indicated that even if *Hauser, supra*, were followed, Heier could not show that he was denied his right to due process because the record does not support a finding that there was a substantial parent-child relationship.* ___ Mich at ___.

*For more information on *Girard, Hauser, Michael H., and McHone*, see Sections 3.2 and 3.8(B)-(C).